**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
| | ) | |
| Improving Competitive Broadband Access to Multiple Tenant Environments | ) ) | GN Docket No. 17-142 |

**COMMENTS OF REALTYCOM PARTNERS**

**July 24, 2017**

**INTRODUCTION.**

RealtyCom Partners ("RealtyCom") is a telecommunications management consulting firm serving multifamily owners, developers, and property managers who collectively own or manage approximately 1,800 apartment communities, totaling approximately 420,000 apartment homes. These communities are located in 43 states and consist of a mix of affordable, senior, market rate, and luxury apartment homes. RealtyCom submits these comments to the Federal Communications Commission ("FCC" or "Commission") in response to the Commission's Notice of Inquiry ("NOI") adopted June 22, 2017, in the matter of Improving Competitive Broadband Access to Multiple Tenant Environments ("MTEs").

On June 9, 2017, RealtyCom, Sares Regis Group, and Sequoia Equities submitted reply comments to the Commission in response to the Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code (MB Docket No. 17-91). We would direct the Commission to those reply comments, which addressed some questions also posed in this NOI with respect to exclusive wiring arrangements (Section 15) and bulk billing arrangements (Section 13). More specifically, we offered evidence that:

1. Exclusive wiring arrangements encourage investment in new or upgraded infrastructure by MTE owners and service providers ("Carriers") as they seek to expand the services and technologies they offer to their residents in a highly competitive rental market. These arrangements also correctly place the burden of the on-going maintenance and repair in the hands of the technology provider, who is

clearly best qualified to ensure the networks are working at peak performance and to reduce potential service issues for the resident. Exclusive wiring arrangements have fueled huge leaps in technological advancement in the use of existing wiring. For example, the launch of DOCSIS 3.1—which enables the delivery of gigabit Internet speeds over existing coaxial cabling—has proven to offer enormous benefits to existing MTEs, allowing for rapid upgrade to gigabit speeds in many market areas. Carriers could not safely invest in wiring infrastructure and necessary upgrades for such rapid, broad deployment of DOCSIS 3.1 technology in a regulatory environment that mandated playing "tug-of-war" with home run cabling.

2. Bulk billing arrangements are beneficial for residents and have particular value in senior, student, and short stay housing. Residents of properties with bulk billing arrangements generally receive tremendous cost savings for services that are provided with convenience and ease to their living units immediately upon move-in. Also, by being able to assure a Carrier of a reliable rate of return for a defined agreement term, owners are often able to persuade Carriers to offer more and better services to small properties and affordable housing projects than they would otherwise be able to justify.

Our present comments will be limited to two areas of discussion within the Commission's Notice of Inquiry: exclusive marketing (Section 13) and revenue sharing agreements (Section 14).

**EXCLUSIVE MARKETING.**

The Commission asks, "*Do exclusive marketing…arrangements hinder competition in the MTE market?*" They do not. However, as a preliminary point of clarification, we emphasize that so-called "exclusive marketing" agreements only apply to a Carrier's right to conduct limited marketing activities *on-site within an MTE* and an *MTE owner's obligations to support* such marketing efforts (e.g., providing space in the leasing office for materials, including pamphlets in move-in packets, etc.). No exclusive marketing arrangement precludes other providers from (a) providing any telecommunications service to residents of an MTE or (b) contacting and marketing to residents in ways that do not involve "boots on the ground" within the MTE, including targeted mailings (postal or email), telemarketing, and online, radio, television, outdoor, and print advertisements. Carriers can and *do* use such methods to effectively reach customers. Additionally, MTE owners typically include all available Carriers in a directory of available utilities that is made available for residents. Given the power of social media—not to mention old-fashioned word of mouth among neighbors—residents are generally well aware of their Carrier options within an MTE; exclusive marketing rights cannot spare a Carrier from the consequences of providing services that are uncompetitive in price or quality.

In response to the question about whether exclusive marketing arrangements hinder competition in the MTE market, we offer some data. With respect to existing MTEs, of the 1,800 apartment communities owned or managed by RealtyCom clients, 94% of these apartment communities have two or more Carriers providing service and 72% have agreements in which exclusive on-site marketing rights have been granted to one of those Carriers. The allegation that exclusive marketing arrangements hinder competition in MTEs cannot be reconciled with the dual observations that (a) such arrangements are fairly common and (b) one or more additional providers typically serve an MTE even if another provider has the exclusive right to conduct on-site marketing activities. As this NOI proceeds before the Commission, two high-profile fiber-to-the-unit providers—one a well-established incumbent, the other a recent California-based entrant—routinely enter into agreements to bring fiber to new construction and existing MTEs, even if they are given no right to conduct on-site marketing of their services. Through their behavior in the market, Carriers daily demonstrate their confidence that, if superior services or pricing are made available within an MTE, residents will learn of it.

There are several practical reasons why an owner or developer of an MTE might grant exclusive marketing rights to one Carrier. For instance, in some geographic areas there may only be one high quality Carrier in the market (e.g., a Carrier offering gigabit Internet access, while a competitor only offers DSL). In some older properties, there may be only one home run wire and the selected Carrier's network design can utilize this wire. Some Carriers expressing interest in marketing rights refuse to negotiate fair agreements with appropriate service level standards and owner protections.[1] Some Carriers that want marketing rights may be small or under-

[1] A contractual commitment for an MTE owner to market the services of an uncompetitive or unpopular provider can impact tenant relations. No owner wants to be blamed by a resident for choosing a bad service provider on the basis of the owner's perceived "endorsement."

capitalized, leading to legitimate concern about their ability to meet service level requirements during the term of the agreement.[2] Sometimes the economics of an exclusive marketing agreement are superior to those of two or more nonexclusive marketing agreements, resulting in additional revenues that can be utilized for capital improvements or supplementing the property's operating budget (for an existing property) and can partially offset substantial development costs involved in providing conduit, cabling, and other low-voltage infrastructure for Carriers' use (for a new construction project). Any means of controlling the construction budget and a community's operational costs typically benefit residents through lower rents.

**REVENUE SHARING AGREEMENTS.**

The Commission also asks several questions regarding revenue sharing agreements, including, "*How are these agreements structured, and what are their typical terms?*" In the agreements our firm helps negotiate on behalf of our clients, any compensation is a part of the overall service agreement between the MTE owner and the Carrier. Service agreements typically range from 5 to 10 years in duration and, depending on the individual needs of the property, may include rights for exclusive marketing, non-exclusive marketing, or access only (i.e., with no right to conduct on-site marketing). In our experience, most agreements between MTE owners and Carriers contain some type of consideration, which can be in the form of contributions to new or upgraded infrastructure, installation of property specific systems (WiFi service for common areas, integration of security systems, such as for camera use, etc.), a one-time payment (often calculated on a per-unit basis as a "door fee"), courtesy services for common areas (e.g., video service for televisions in the clubhouse or fitness center), and revenue share payments (akin to "percentage rent" in a commercial leasing context). Contrary to irresponsible allegations by Incompas, this is no "kickback scheme."[3] Rather, such

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[2] In addition to the quality of such a Carrier's service, *availability* can be a concern. One of the most stressful situations an MTE owner encounters is when a service provider files for bankruptcy, leaving the status of its agreement with the owner, usage rights for existing communications infrastructure, and availability of critical services to residents subject to acceptance or rejection by a bankruptcy trustee, with little or no advance notice.

[3] Ex Parte letter to Chairman Pai, dated February 9, 2017, from Angie Kronenberg, Chief Advocate and General Counsel for Incompas, "*Enabling Competitive Broadband; WT Docket No. 16-138, WC Docket No. 16-132, IB Docket No. 16-131, PS Docket No. 16-128; WC Docket No. 05-25; WC Docket No. 16-143, RM-10593,*" pp. 3-4.

contractual consideration flows directly from: (a) significant capital costs MTE owners bear in providing facilities for Carrier use; (b) ongoing operational costs to MTE owners in performing their obligations under the agreements; and (c) MTE owners' reluctance to have to distribute such costs to residents in the form of higher rents. Some examples will illustrate how these arrangements play out in the competitive market:

**Overbuilding.** Some Carriers seek to overbuild existing properties, often with fiber to the unit. Performing this work requires expense for the Carrier, of course; but there are also significant costs for the MTE owner. Since most MTE owners do not have the necessary technical expertise to thoroughly evaluate plans and specifications for a new system, they will need to hire outside experts to assist in this. Negotiating a service agreement that reasonably protects the MTE owner, residents, and the property requires resources, whether handled in-house or through outside counsel. Responsibly managing installation makes major demands upon property management—particularly for a fiber-to-the-unit system, which necessitates that the MTE owner staff up in order to coordinate and oversee access to occupied units for the duration of an installation schedule that often stretches out over several months. Many Carriers offer an initial per-unit fee and/or recurring payments (typically as a percentage of revenues) to help offset such costs, as well as to reasonably compensate the MTE owner for the use of space, facilities, and electrical service necessary for its system, as well as any marketing rights and obligations that the parties may agree to. Without some economic consideration to offset the demands a Carrier places upon the MTE owner, an owner may be unable to justify the commitment of resources, resulting in fewer and poorer choices for residents.

**New developments**. In new developments, Carriers may offer consideration to partially offset the variety of costs associated with facilitating the Carrier's service to the property. In addition to MTE owners' expenses for low-voltage expertise and legal representation, owners typically provide and install a range of system components necessary for the Carrier's use. Such components may include: (i) conduit from the property line to the main distribution frame (MDF); (ii) adequate space for Carrier equipment in the main distribution frame room (ranging from 100 to 400 square feet for a single Carrier); (iii) conduit from the MDF to each intermediate distribution frame room (IDF), which can come at a hefty price, particularly in campus or garden style developments; (iv) space for Carrier equipment in the IDF rooms (ranging from 40 to over 100 square feet for a single Carrier); (v) inside wiring and pathways from the IDF closet to a distribution panel in each apartment (e.g., microduct, smurf tube, Ethernet, coaxial, and fiber optic cabling, etc.); (vi) a low-voltage distribution panel within each unit with sufficient size and electrical power to allow all Carriers serving the property to place equipment and cross-connect with in-unit wiring; and (vii) in-unit cabling from the distribution panel to each outlet (e.g., Ethernet and coaxial cabling).

It is a simple reality that providing space and facilities for a Carrier in an MTE is not cheap. Providing space and facilities for multiple Carriers is even more expensive. To take one small example, the cost of a low-voltage distribution panel—which houses the Carrier electronics in each unit and provides the point of interconnection with the in-unit wiring—depends on the size of the cabinet. The size of the cabinet depends on the number of Carriers to be accommodated within it and their specific network designs. The smallest distribution panels (14") are the cheapest, but typically allow for placement of only one Carrier's equipment. For additional expense, a 21" panel may allow for two Carriers (or still only one, with some system designs). The developer of an MTE is more than doubling the distribution panel cost in installing a 42" panel that can safely allow for two or maybe three Carriers. A $50 cost bump per unit becomes a $15,000 hit to the construction budget of a 300-unit development. These types of costs multiply out. Financial consideration in MTE owners' contracts with Carriers helps offset some of these costs, along with ongoing costs and obligations borne by the owner, better *enabling* provision of space and facilities necessary for competition between Carriers within the building. This is the case with upfront per-unit contributions, as well as recurring payments based on a percentage of a Carrier's subscriber revenues at the MTE.

The Incompas claim that this amounts to a "kickback scheme" with anticompetitive intent or effect is absurd. Critics of revenue sharing arrangements clearly have not done the math, nor do they demonstrate any real world experience with property operations or actual resident subscriptions. Case in point: one such critic recently published a specific Carrier's compensation schedule indicating that the Carrier would provide compensation on a sliding scale based on the number of customers they had at a community.[4] Let us assume a 200-unit

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[4] Susan Crawford, "Dear Landlord: Don't Rip Me Off When it Comes To Internet Access," Backchannel (Jun. 27, 2016), https://backchannel.com/the-new-payola-deals-landlords-cut-with-

community with two Carriers, with an exact division of subscriber penetration between them. With a reasonable 60% total penetration for video services, each Carrier would have 30%; and with 80% total penetration for Internet services, they each would have 40%. Using the published schedule, the property would receive *no payment at all* for video services, since the obligation does not even begin until 51% penetration. For Internet service at 40% penetration, the property would receive a 4% revenue share. With an average high speed Internet bill of $49 (not including taxes, fees, and whatever other exclusions the Carrier may have negotiated in its contract), the revenue share would add up to approximately $156.80 per month from each Carrier (assuming both are paying revenue share using the same schedule).

That is no windfall, by any stretch of the imagination, and barely enough to cover some of the expense of having property staff manage Carriers' access and work, pay for electrical power for Carriers' equipment, and address resident issues with respect to communications services. It is *certainly* not enough to cover the loss of a single resident who is paying $1,000 to $5,000 a month in rent (depending on the market), much less the greater and longer term harms of higher vacancy or turnover rates. MTE owners are in fierce competition with each other to win and retain residents. Any owner that could be lured into saddling residents with uncompetitive service for some pocket change from a shoddy Carrier would witness a mass migration of residents to nearby properties with less short-sighted management. National trade organizations for residential MTE companies hold educational sessions on competitive communications technology at nearly every conference and host annual events specifically *focused* on making owners aware of the latest technologies, best practices in protecting resident experience, and enhancing property value through communications amenities. Critics of

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internet-providers-cf60200aa9e9#.gt2zhyfc4. Incompas cited Crawford's article, with apparent approval, in their ex parte comments to Chairman Pai. In comments opposing the Petition of the Multifamily Broadband Council Seeking Preemption of Article 52 of the San Francisco Police Code (MB Docket No. 17-91), both the City and County of San Francisco and Fiber Broadband Association (of which Google is a prominent member) favorably cited the same article. Earlier this year, Professor Crawford has taken a position as co-chair, along with Article 52 sponsor Supervisor Mark Farrell, of the San Francisco Municipal Fiber Blue Ribbon Panel—an organization designed to generate popular support for San Francisco's plan to build its own fiber network to every residential and business location in the city. http://www.sfchronicle.com/business/article/Panel-to-study-wiring-San-Francisco-with-10999099.php revenue sharing arrangements are, in effect, accusing MTE owners of being "penny wise, pound foolish"—an accusation both counterfactual and insulting to the entire industry.

While revenue sharing arrangements only provide a modest amount of potential compensation, they do help reduce operational costs for MTE owners and ultimately benefit the residents; on that front, every little bit helps. Revenue share arrangements also enable meaningful and unique reporting mechanisms that benefit MTE owners and residents. RealtyCom currently manages 831 such agreements covering approximately 191,000 apartment homes for our clients. Carriers report gross subscriber numbers on a monthly or quarterly basis, providing a check on the health of their operations at a specific property. This information allows us, and Owners who receive this information, to gauge how a Carrier is doing at a property and to intervene before a potential issue becomes widespread. By evaluating the relative performance of providers, MTE owners can better identify the Carriers that are most (and *least*) valued by residents within a market, allowing owners to better satisfy residents' demands at new properties and when curating an appealing mix of Carriers at existing properties.

**OTHER QUESTIONS.**

The Commission asks, "*Do these agreements affect the price MTE tenants ultimately pay for service?*" No, they do not. The rates charged to residents for services by Carriers are not at all impacted by these agreements. Incumbent franchised Carriers (multiple system operators and local exchange carriers) are not permitted to offer differential pricing within a geographic area or discriminate at a property level. As an additional check on this, most MTE owners specifically address the issue of pricing in their contracts with Carriers to ensure that residents are not charged more than the Carriers' other customers in the market area and that they are offered the same discounts and promotions that are made available elsewhere in the market.[5]

The Commission asks, "*Are these arrangements problematic only if they are exclusive,*

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[5] In our experience, the greatest resistance to contractual protections that benefit residents—including prohibitions against discriminatory pricing and provision of services that are not of equal quality to similarly situated properties in the market area—does not come from large incumbent service providers, but from some high-profile new market entrants.

*or even if more than one Carrier is able to enter into them?*" These arrangements are not problematic and do not hinder competitive access to MTEs, whether they involve exclusive or non-exclusive rights to conduct on-site marketing. As stated above, out of 1,800 existing MTEs owned or managed by RealtyCom clients, 94% of them have two or more Carriers, even though 72% of them have granted exclusive marketing rights to a single Carrier.

The Commission asks, "*Does the size of an MTE affect whether these provisions are included in the contract?*" In some instances, property size can affect the types of consideration offered. Specifically, some Carriers cannot justify a large capital expense for a small number of units (e.g., under fifty). However, other provisions in agreements, such as constraints on pricing discrimination, service standards, and obligations for maintenance and repair of infrastructure do not significantly differ based on the size of the MTE.

The Commission asks, "*Are the agreements negotiated strictly between MTE owners and broadband Internet access service providers, or are intermediaries involved?*" MTE Owners and managers, like many businesses, use a multitude of third parties to assist them in areas requiring specialized expertise. Operations, management, software design and management, security design and management, IT design and management, and telecom design and management are all necessary functions within the real estate industry. While some of the largest MTE owners may have the resources to perform many of these functions in-house, most use third parties to supplement in-house resources. Our clients engage us to, among other things, manage their telecom agreements with Carriers, assist them with evaluation of new technologies as they are deployed in different markets, evaluate the options to renew or replace existing agreements as they come to term, manage the installation and design of broadband infrastructure in new developments, assist them in replacing or upgrading infrastructure and Carriers, assist the acquisition teams on the assumption of new agreements upon purchase of an asset, transfer agreements in the event of an asset sale, and to assist in managing the relationships between Carriers and the site staff to ensure residents are receiving the highest quality services. RealtyCom strictly works for MTE owners and managers and does not work for Carriers.

The Commission asks, "*Do such agreements have an impact, either positive or negative, on the level of broadband competition within MTEs?*" These agreements have a positive impact on competition in MTEs because they allow MTE owners to recoup some of the substantial costs associated with new or upgraded infrastructure installation which, in many cases, means the difference between an MTE owner deciding they can afford having additional Carriers serve their community. We see no evidence that MTEs are underserved because of the existence of revenue sharing agreements. Again, as stated above, approximately 94% of MTEs owned or managed by RealtyCom clients have two or more Carriers.

**CONCLUSION.**

For the reasons discussed above, the Commission should not entertain further rulemaking regarding exclusive marketing, exclusive use of wire, revenue sharing agreements, or bulk billing agreements, as the market is functioning well, with no adverse impact to the availability of broadband services to MTE tenants. Indeed, MTE residents have more and better service options available to them today than they ever have before.

Respectfully submitted,

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